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Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 73-1631.

LOUIS OSTRER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner's Reply Memorandum.

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This memorandum is submitted in response to the brief for the United States in opposition, which was served on the petitioner's counsel on or about September 16, 1974.

The Government, in its opposition to the certiorari petition, argues that since the petitioner relies "almost exclusively" on the Rush letter and on "the analyses of that letter by seven different phychiatrists," and since those psychiatrists' analyses were based "on an erroneous version of the letter,"[1] the analyses are worthless and can-

[1] The erroneous version of the letter given to the psychiatrists stated ". . . I cannot *admit* what appear before me when I was on the jury bench." instead of correctly stating ". . . I cannot *omit* what appear before me when I was on the jury bench."

not lead to a conclusion that the juror was either insane or hallucinating during the trial. The Government contends that "the mistranscription was crucial, since the mistake constituted the only concrete evidence in the letter that the juror had hallucinated at trial." (Government's Brief at 7.)

The Government's point is trivial, and it was dismissed even by the Court of Appeals majority. Contrary to the Government's assertion that *all* of the psychiatrists relied on the mistranscription, the majority concluded that while six of the seven psychiatrists had received the erroneous version, and while "these errors may have influenced their reading and subsequent analysis of the letter," nevertheless "we do not think [the error influenced their analyses] significantly." (Petitioner's Appendix at 35, n. 8.) The majority specifically took issue with the Government's argument made before the Court of Appeals, and now repeated in its memorandum to this Court, that the mistranscription was "the cornerstone of [the] various psychiatric opinions." (Appendix at 35, n. 8.)

Furthermore, petitioner's counsel is now in possession of a supplemental affidavit of Dr. Stanley L. Portnow, indicating that the mistranscription had no effect on his conclusions and that the word change would not have affected his judgment. At a hearing, all of the psychiatrists called would so testify. This is in complete accord with the Court of Appeals majority's conclusion that "[t]he defendants' contentions concerning the competency of Miss Rush rest as much on the letter taken as a whole as on any particular sentences." (Appendix at 35, n. 8.) [2]

[2] Since there was no hearing below, and since the Government's assertions regarding the mistranscriptions are entirely *dehors* the record, it is appropriate for this Court either to consider *both* the Government's allegation *and* petitioner's supplemental affidavit, or *neither* of these.

Most remarkable is the Government's conclusion that once the mistranscription is corrected, the Rush letter provides "strong evidence of mental competence." (Government's Brief at 8.) How the Government can argue that such a letter provides "strong evidence of mental competence," and how the Government can interpret Miss Rush's statements to refer to evidence she viewed at trial rather than evidence emanating from her claimed "clairvoyant" powers, is a complete mystery, and such an interpretation receives absolutely no support from the text or the context. Neither of the lower courts reached the absurd conclusion that the Government seriously asks this Court to accept—that the letter, or parts of it, actually provide "strong evidence of mental competence."

The Government goes on (Government's Brief at 9) to claim that simply because Miss Rush's letter indicates that she had a good memory for detail, therefore she must have been competent. Such reasoning is absurd and would make a competent person out of, for example, an idiot savant, whose memory for detail, but whose inability to make sense out of logical facts, is well-known to psychiatrists. The main question is whether Miss Rush remembered some facts and events which simply did not take place at the trial.

The Government claims (Brief at 8) that the psychiatrists' opinions were "uninformed." The Government fails to note, however, that the psychiatrists had nothing before them except the letter because the District Court issued an order forbidding the interview of Miss Rush or of any of the other jurors. (In this regard, see Judge Feinberg's dissent, Appendix at 54.)

The Government denies petitioner's claim that the majority rested its decision on an assumption that the mental infirmity disqualification of 28 U.S.C. § 1865 "applied only

to mentally ill persons who have been formally adjudicated as 'insane' or 'incompetent'. . . ." (Government's Brief at 6-7, including n. 8.) Yet the Court of Appeals majority decision is entirely clear on this point, and indeed petitioner's reading of that opinion is the correct one. Stated the majority:

> "With respect to post-verdict evidence of possible juror incompetency during the trial, courts have refused to set aside a verdict, or even to make further inquiry, unless there be proof of an adjudication of insanity or mental incompetence closely in advance of the time of jury service. [Footnote omitted.] Only when proof of this nature has been offered, or proof of a closely contemporaneous and independent post-trial adjudication of incompetency [footnote omitted], have courts conducted hearings to determine whether the disability in fact affected the juror at the time of trial." (Appendix at 42-43.)

The Government appears to recognize how unrealistic such a standard is, and this is doubtless the reason the Government backs away from sanctioning such a standard. But the Government cannot back away from the fact that the Court of Appeals majority expressly relied on that standard. Every case cited by the Court of Appeals on this point adopts precisely that same standard. If indeed the Government believes that another, more modern and enlightened standard is more appropriate, then the Government should be joining in the petitioner's request that a writ of certiorari issue.

The Government (Brief at 7, n. 9) claims that "there is no evidence to support [petitioner's] conclusion that the juror was a mental patient who worked part-time attending other patients at Flower Fifth Avenue Hospital,"

and that there is not even evidence indicating that Flower Fifth Avenue was a mental hospital or that the juror was a patient there. (See the Petition at 24-26.) However, before counsel for petitioner stated in the petition (at 26) that Flower Fifth Avenue Hospital "does have a psychiatric service and apparently does have a program of employing psychiatric patients as attendants," counsel checked this fact with the administration of that hospital and learned that the hospital does have a large psychiatric ward, and that patients are often used as "patient-attendants" to help care for other patients. Counsel could not determine whether Miss Rush was a patient there, because the District Court's order explicitly precluded all investigation of Juror Rush. The Government cannot now fault petitioner for his failure to conduct precisely the sort of investigation that the District Court precluded him from conducting.

Finally, the Government does not deny here what it acknowledged below—namely, that the hearing procedure requested by petitioner "would provide maximum safeguards for the jurors' individual rights of privacy."[3] In light of this acknowledgment, there is no possible justification for allowing this probably-tainted conviction to stand without further inquiry into the juror's competence by the District Court.

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[3] See Petition for Writ of Certiorari at 23-24 for an elaboration of this point and for quotations from the Government's memorandum below.

Conclusion.

For the foregoing reasons and for those stated in the petition, a writ of certiorari should issue.

Respectfully submitted,

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